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No. 133

In the Supreme Court of the United States

OCTOBER TERM, 1960

CHARLES B. SOLOMON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

No opinion was rendered by the district court. The opinion of the Court of Appeals (Pet. 17-28) is reported at 276 F. 2d 660.

JURISDICTION

The judgment of the Court of Appeals was entered on April 4, 1960. A timely petition for rehearing was denied on May 13, 1960. The petition for a writ of certiorari was filed on June 8, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' failure to object to certain portions of the district court's charge to the jury

precluded them from raising those objections before the Court of Appeals.

2. Whether the court below correctly affirmed the district court's application of settled principles of joint and several liability for conspiracy to the special jury findings in this case.

3. Whether the five-year statute of limitations in 28 U.S.C. 2462 applies to suits under Section 26(b)(2) of the Surplus Property Act, which permits the United States to recover, as liquidated damages, a sum equal to twice the consideration agreed upon in a surplus property sale.

4. Whether petitioners were entitled in the Court of Appeals to have their petition for rehearing *en banc* considered by that court *en banc*.

STATUTES INVOLVED

Section 26 of the Surplus Property Act of 1944, 58 Stat. 765, 780, 50 U.S.C. App. (1946 ed.) 1635, provides in pertinent part as follows:

> "(b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act; or who enters into an agreement, combination, or conspiracy to do any of the foregoing—
>
> (1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States

may have sustained by reason thereof, together with the cost of suit; or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained, and the United States shall return as liquidated damages any consideration given to the United States or any Government agency for such property.

Section 209 of the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, 392, 40 U.S.C. 489, provides in pertinent part as follows:

(b) Every person who shall use or engage in, or cause to be used or engaged in, or enter into an agreement, combination, or conspiracy to use or engage in or to cause to be used or engaged in, any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Federal agency in connection with the procurement, transfer, or disposition of property hereunder

(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the cost of suit; or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed

to be given by the United States or any Federal agency to such person or by such person to the United States or any Federal agency, as the case may be; or

(3) shall, if the United States shall so elect, restore to the United States the money or property thus secured and obtained and the United States shall retain as liquidated damages any property, money, or other consideration given to the United States or any Federal agency for such money or property, as the case may be.

Section 2462, Title 28, United States Code, 62 Stat. 974, provides as follows:

Time for commencing proceedings

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced with five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

STATEMENT

The United States filed this suit to recover civil damages from petitioners for violation of Section 26 of the Surplus Property Act of 1944 (58 Stat. 765, 50 U.S.C. App. (1946 Ed.) 1636). The complaint alleged that petitioner Solomon conspired with veterans he used as front men to purchase for

"R." references are to the pages of the two volume Appendix for Appellants, filed as a printed record in the court below.

him, with the use of veterans' priority certificates, surplus Government steel to which he was not otherwise entitled (R. 6a–7a). The essence of the fraud lay in the veterans' certifications that they were in the steel business and required the surplus property for use in that business, when in fact they were not in that business, but were solely agents for Solomon in the purchase of the steel. Solomon provided the funds (R. 417a, 418a; 436a, 448a; 460a) issued shipping instructions, and resold the steel. The veterans had no warehouse facilities (R. 412a, 445a, 477a), did not inspect the property (R. 420a, 454a), did not have anything to do with its shipment (R. 420a–421a), and except for these transactions were not engaged in the steel business (R. 430a, 444a–446a, 464a–465a).

The case was tried to a jury which returned verdicts against petitioners. The jury was charged that if it found a conspiracy to violate the Act, if the veterans' applications for property were false, and if petitioners' real intention was that the veterans' business enterprises were mere shams or fictions used for the purpose of obtaining the property for Solomon, it should award a sum against each defendant equal to twice the amount paid by him for the property (R. 538a–544a). No objection was made to the charge (R. 549a–551a).

The jury returned its verdicts in favor of the Government and against the individual petitioners as follows (R. 552a–556a):

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The awards against Tucker, Mohr and Weston (the veterans) are double the amount paid by each of them for the particular surplus property that he purchased (R. 413a, 430a, 443a, 447a, 458a, 355a–362a). The award against Solomon is the total of the three preceding awards. Judgment was subsequently entered jointly and severally against each of the veterans and Solomon as follows (R. 571a):

Tucker and Solomon	$27,747.36
Mohr and Solomon	51,903.92
Weston and Solomon	62,572.68

The Court of Appeals unanimously affirmed. In a comprehensive opinion which discusses most of the questions raised by petitioners here, the court held that there was substantial evidence to support the jury verdict and the district court's judgment, and that each of the errors reasserted here as to the district court's handling of the case was lacking in merit.

ARGUMENT

All of petitioners' contentions here were either fully considered and rejected by the Court of Appeals, or were deemed by that court not properly before it. These rulings were clearly correct. In any event, the numerous issues which petitioners raise do not warrant review by this Court, since the alleged errors relate only to this particular case, and do not present any questions of general importance.

1. THE CHARGE TO THE JURY UNDER THE 1949 ACT

Petitioners claim error in the district court's charge to the jury on the ground that the court read from

the 1949 version of Section 26 of the Surplus Property Act, rather than from the 1944 formulation of that Section. But since petitioners did not object to the charge, they are precluded from now attacking it by Rule 51 of the Federal Rules of Civil Procedure, which states that, "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict * * *".

In any event, petitioners do not attempt to show that the charge was prejudicial to them, but merely suggest the "possibility" that the jury might have returned a different verdict had it been charged differently (Pet. 8).[1] This conjectural possibility affords no basis for overturning the verdict. It is true that since the 1949 Act imposes liability for fraudulent schemes in connection with the "procurement, transfer, or disposition" of surplus property, while the 1944 Act reaches only schemes involving the "disposi-

[1] For the same reason, the Court of Appeals correctly refused to consider the contention, here repeated (Pet. 10-11), that the government was required to prove the extent of the non-veteran's interest in the business. Pertinent regulations provided that, where a veteran was in business with a non-veteran, the veteran could obtain surplus property only if he had more than a 50% interest in the capital or profits of the enterprise. The trial court instructed the jury that the extent of the non-veteran's interest in the enterprise was immaterial, since there was no contention that any persons were associated with the veterans in their alleged steel businesses (R. 5321) and petitioners did not object to the instruction. Moreover, the instruction was clearly correct in view of the government's theory that the veterans were not engaged in the steel business at all, but were mere agents of Solomon.

tion" of such property (*supra*, pp. 2, 3), there might in some cases be liability under the former although not under the latter. But this is not such a case. For here, as the Court of Appeals pointed out (Pet. 24, emphasis in original), "[t]he illegal conspiracy was not one to *dispose* of government property. It was a conspiracy to *obtain* government property *in connection with* its disposition by the Government under the Act." In this case, therefore, the difference between the standards under the two Acts is immaterial. In any event, petitioners have pointed to no evidence that these conspiracies related to anything other than the *disposition* of property.

2. STATUTE OF LIMITATIONS

This Court recently held that since Section 26 of the Surplus Property Act provides for a civil remedy rather than a penalty (*Rex Trailer Co.* v. *United States*, 350 U.S. 148), the five-year statute of limitations in 28 U.S.C. 2462 upon suits "for the enforcement of any civil fine, penalty, or forfeiture" is not applicable to suits under Section 26. *Keller* v. *United States*, 359 U.S. 309. Petitioners urge (Pet. 8-9), however, that this rule applies only to proceedings under Section 26(b)(1), which provides for liquidated damages of $2,000 for each transaction and double the damages sustained, and not to proceedings under Section 26, which provides for liquidated damages of "twice the consideration" agreed to be paid for the surplus property. But Section 26(b) contains three "alternative remedies" which are "*in pari materia*."

[illegible]

and exhibits "of the same nature and designed to serve the same purpose." *Rex Trailer, supra*, pp. 151–152. Relying on these considerations, the Court of Appeals correctly refused to apply different limitations periods to these interrelated alternative remedies.

3. EFFECT OF REPEAL OF THE 1944 ACT

Petitioners argue (Pet. 7, 11–12) that the United States had no right to bring this action because most of the 1944 Act, including Section 20, was repealed by the 1949 Act. However, they ignore the effect of the general savings statute in 1 U.S.C. 109, which treats an act that is repealed as remaining in force for the purpose of enforcing liabilities which arose thereunder. *De La Rama Steamship Co. v. United States*, 344 U.S. 386; *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535, 553–555. *Great Northern Ry. Co. v. United States*, 208 U.S. 452, upon which petitioners rely, does not help them. There, even though the reenactment did accomplish a substantial revision of the prior statute, it was held that a suit could still be maintained under the former statute because Congress had not evidenced a design to forgive liabilities arising thereunder. The situation here, involving substantial reenactment, follows *a fortiori*.

4. APPLICABILITY OF SECTION 20(b)(2) TO INTRASTATE TRANSACTIONS

Petitioners contend (Pet. 10) that Section 20(b)(2), which permits recovery of twice the consideration received to be paid, applies only to executory, and not to executed, transactions. But the broad language of the statute makes no such distinction, and to the contrary, it gives the government three alternative

brought in 1947, the government was aware that petitioners had demanded it. Thus, even assuming that the mutiny suit and the O.P.A. suits involved "inconsistent rights," it is clear that the institution of the latter did not bar the former.

ALLEGED IMPROPER VARIANCE BETWEEN JURY VERDICT AND JUDGMENT

Petitioners further claim (Pet. 12-16) that they were denied their constitutional right to trial by jury because the trial court entered judgment against them jointly and severally, although the jury verdict fixed their liabilities only severally. But it is clear that the trial court action was proper, and involved no denial of petitioners' constitutional rights.

As noted *supra*, p. 3, the trial court instructed the jury to state separately in its verdict the individual liability of each petitioner. The jury's verdict fixed the liability of each of the three veterans separately, and fixed the liability of the non-veteran Solomon in an amount equal to the sum of the veterans' liabilities. The jury verdict obviously was not the final judgment against petitioners; as the Court of Appeals pointed out (Pet. 26), "[t]he separate verdicts in this case are merely factual findings." Since conspirators are jointly and severally liable, the trial court was fully warranted in using the jury's findings as to petitioners' individual liabilities to enter a judgment that imposed such liabilities jointly and severally.

7. DENIAL OF REHEARING EN BANC

Finally, petitioners suggest (Pet. 16) that the denial of their petition for rehearing *en banc* by a three-judge panel rather than by the full Court of Appeals, was not "in compliance with" *Western P. R. Corp.* v. *Western P. R. Co.*, 345 U.S. 247. *Western* expressly stated, however, that the statute governing rehearings *en banc* (28 U.S.C. 46(c)) "should not be construed to compel the court to entertain, *en banc*, motions for a hearing or rehearing *en banc*" (p. 258); that a court of appeals may "entrust * * * the initiation of a hearing or rehearing *en banc* to the three judges who are selected to hear the case" (p. 259); and that the court has "wide latitude of discretion" in adopting a procedure governing hearings *en banc*. See also *United States* v. *American Foreign S.S. Corp.*, 1959 Term, No. 138, decided June 20, 1960, slip opinion, p. 4.

The practice followed by the court below for some years has been that petitions for rehearing are considered by a regular panel of three judges, and will not be considered by the court *en banc*; and the Sixth Circuit has clearly announced this rule for the benefit of the bar, and has stated that it "was established after full consideration by a majority of the Circuit Judges of this Circuit in active service." *Northwest Airlines, Inc.* v. *Glenn L. Martin Company*, 229 F. 2d 431 (C.A. 6), and the cases cited in the clerk's letter to petitioners (Pet. 29). This is all that the *Western* case requires.

CONCLUSION

The decision of the Court of Appeals is clearly correct. None of the questions raised by petitioners as to which this Court has not spoken is of general importance, nor is there any conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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